No. 89-386

(3)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

PORT AUTHORITY
TRANS-HUDSON CORPORATION,
Petitioner,
v.
PATRICK FEENEY,
Respondent.

PORT AUTHORITY
TRANS-HUDSON CORPORATION,
Petitioner,
v.
CHARLES T. FOSTER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Pursuant to Rule 36.3 of the Rules of the Court, *amici* respectfully move this Court for leave to file the attached brief *amici curiae* in support of petitioner. Petitioner has consented to the filing of this brief. This motion is made necessary by the failure of respondents' counsel to respond to *amici*'s request for consent.

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in the issue presented here: how to determine when States should be deemed to have waived their Eleventh Amendment immunity against suit in federal court. Proper resolution of this question will limit the circumstances in which States improperly are forced to appear in federal court against their will, and will make it unnecessary for federal judges to determine their jurisdiction by guessing at the meaning of ambiguous state laws. Beyond that, States have an interest in assuring that the rules governing the interpretation of waivers of immunity remain constant; because state legislatures enact laws against the background of those rules, a change in the Court's interpretive approach may work changes in the effective meaning of existing state laws.

Because of the importance of these issues to the States, *amici* seek leave to file this brief to assist the Court in the resolution of this case.

Respectfully submitted,

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December 14, 1989

QUESTION PRESENTED

Amici will address the following question:

Whether the court of appeals properly applied this Court's standards in concluding that New York and New Jersey statutes effected a waiver of the Port Authority's Eleventh Amendment immunity.

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INTEREST OF THE *AMICI CURIAE*

The interest of the *amici* is set forth in the motion accompanying this brief.

STATEMENT

This brief addresses only the second question presented in the petition for a writ of certiorari, which relates to the standards for finding waivers of Eleventh Amendment immunity. The statement of the case therefore is limited to developments below that bear on that issue. While *amici* are directly affected by the rules governing waivers of immunity, we do not have a general interest in the precedent question whether particular entities are treated as "States" for Eleventh Amendment purposes. We therefore do not address the question whether the Port Authority should be permitted to claim Eleventh Amendment immunity in the first instance.

1. The Port Authority of New York and New Jersey (Port Authority) was created by an interstate compact entered into by the States of New York and New Jersey and approved by Congress in 1921. See 42 Stat. 174 (1921). The Port Authority has a variety of specified responsibilities, many of which it performs through its wholly owned subsidiary, petitioner Port Authority Trans-Hudson Corporation (PATH). See generally N.Y. Unconsol. L. § 6601 *et seq.* (McKinney 1979 & Supp. 1989); N.J.S.A. 32:1-1 - 35.50 (West 1979).

As originally enacted, the Compact made no provision for suits against the Port Authority. That was changed in 1950 and 1951, when New York and New Jersey, acting pursuant to the Compact's Article Seven,[1] respectively enacted reciprocal legislation "consent[ing] to suits, actions or proceedings of any form or nature at law, in equity or otherwise (including proceedings to enforce arbitration agreements) against the Port of New

[1] Article Seven provides that "[t]he port authority shall have such additional powers and duties as may hereafter be delegated or imposed upon it from time to time by the action of the legislature of either state concurred in by the legislature of the other." N.Y. Unconsol. L. § 6408; N.J.S.A. 32:1-8.

York Authority." N.Y. Unconsol. L. § 7101; N.J.S.A. 32:1-157 (reprinted at Pet. App. A54). The Legislatures also imposed several limitations on this consent (see N.Y. Unconsol. L. §§ 7102-7105; N.J.S.A. 32:1-158 - 161), and enacted a venue provision which provides:

> The foregoing consent is granted upon the condition that venue in any suit, action or proceeding against the port authority shall be laid within a county or a judicial district, established by one of said states or by the United States, and situated wholly or partially within the port of New York district. The port authority shall be deemed to be a resident of each such county or judicial district for the purpose of such suits, actions or proceedings.

N.Y. Unconsol. L. § 7106; N.J.S.A. 32:1-162.

2. These consolidated cases involve separate actions brought in the United States District Court for the Southern District of New York against PATH by respondents, two PATH employees. Asserting claims under the Federal Employer's Liability Act, 45 U.S.C. § 51 *et seq.*,[2] respondents argued that the Eleventh Amendment was not a bar to their actions because, among other things, New York and New Jersey were said to have waived the Port Authority's constitutional immunity against suit in federal court. Both district courts rejected that contention, holding that the Eleventh Amendment denied them jurisdiction over respondent's claims. Pet. App. A27-A44; A46-A50.

In rejecting respondent Feeney's waiver argument, the district court explained that "[w]aiver will be found only where it is stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable interpretation." Pet. App. A40. Here, the court found that the consent-

[2] Respondent Feeney also asserted claims under the Boiler Inspection Act, 45 U.S.C. § 22, and the Safety Appliance Act, 45 U.S.C. § 1. Pet. App. A28.

to-suit and venue provisions added to the Compact in 1951 do not speak with the requisite clarity, noting that "[t]he consent to suit provision of the Port Authority statute essentially empowers the Authority merely to sue and be sued." Pet. App. A40 (footnote omitted). That authorization "does not meet the 'unmistakably clear language' requirement because 'the Supreme Court has made it clear that the particular provision relied on must indicate the state's specific intention to be sued in federal court.'" Pet. App. A41 (citation omitted).

In rejecting respondent Foster's waiver argument, the second district judge agreed that the consent-to-suit provision "is insufficient to establish Eleventh Amendment waiver, since it does not specify an intention to permit suits in federal courts." Pet. App. A48. The court added that this omission was not remedied by the Compact's venue provision, explaining that

> [a]lthough the reason for the reference in [N.Y. Unconsol. L.] section 7106 to a federal judicial district is far from clear, it is clear that the legislature of New York knows how to consent to suit in federal court if that is its purpose. It is difficult to believe that it would have chosen the indirect and ambiguous language of section 7106 if its intention had been to waive the Port Authority's Eleventh Amendment immunity. Furthermore, an examination of the legislative history of this statute shows an intention only to waive sovereign immunity. The Eleventh Amendment was not addressed.

Pet. App. A49.

3. The court of appeals reversed. Writing in respondent Feeney's case (Pet. App. A8-A21), the court "acknowledge[d] that the standard for determining whether a state has waived its Eleventh Amendment immunity is strict." Pet. App. A16. But the court found that standard satisfied here, reading the Compact's venue provision to "expressly state[] that [suits against the Port Authority] may be brought in federal courts." Pet. App. A17. While the court of appeals "concede[d] that the statute's use of the term 'venue' is somewhat anomalous in the Eleventh Amendment context" (*ibid.*), the court added that the venue provision "is entirely meaningless" if it does not effect a waiver of Eleventh Amendment immunity. Pet. App. A18. The court of appeals also found support for its conclusion in the consent-to-suit provision's legislative history, which it read to express disapproval for a federal district court decision that had dismissed an action against the Port Authority on sovereign immunity grounds. Pet. App. A17. The court of appeals proceeded to reverse the district court's dismissal of respondent Foster's claim on the basis of its opinion in *Feeney*. Pet. App. A24-A25.

SUMMARY OF ARGUMENT

The Eleventh Amendment deprives federal courts of jurisdiction to entertain claims against a State except in two circumstances: when the State waives its immunity, or when Congress abrogates that immunity. This case involves the waiver prong of the immunity analysis. In such cases, the controlling rules are settled: a federal court will find a waiver of Eleventh Amendment protections only when the State's consent to suit is stated in express statutory language. It is not enough that the State has waived its immunity in general terms, or has waived sovereign immunity in its own courts. The State must, instead, have specified its intention to subject itself to suit in federal court. This rule assures that federal courts will not expand their jurisdiction—and thus disturb the constitutional balance between the Federal Government and the States—in the absence of unambiguous evidence that the State affirmatively considered the Eleventh Amendment issue in effecting a waiver of immunity.

The Port Authority Compact's consent-to-suit and venue provisions do not satisfy these strict waiver requirements. The consent-to-suit provision makes no mention of either the Eleventh Amendment or the possibility of suit in federal court; under this Court's precedents, the provision therefore cannot be deemed to waive the Port Authority's Eleventh Amendment protections. In coming to a contrary conclusion, the court below found evidence in the legislative history that the New York Legislature, in enacting the provision, intended to disapprove a federal district court decision that had dismissed an action against the Port Authority on sovereign immunity grounds. But legislative history generally should be irrelevant to the waiver inquiry. And in any event, the evidence relied upon by the court of appeals—the legislative history's inclusion of a single federal decision in a string citation of rulings that had accorded the Port Authority sovereign immunity—hardly evidences an unambiguous, considered decision to waive constitutional protections against suit in federal court.

The court below also found it probative that the Compact contains a provision laying venue in suits against the Port Authority "within a county or judicial district, established by one of said states or by the United States." But the placing of venue and the waiver of Eleventh Amendment immunity are two entirely different things. Absent waiver, the Eleventh Amendment deprives federal courts of subject matter jurisdiction to entertain claims against States. In contrast, "[v]enue provisions come into play only *after* jurisdiction has been established." *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 793 n.30 (1985) (emphasis added). This distinction between jurisdiction and venue—and this usage of the terms—was settled at the time of enactment of the Compact's consent-to-suit and venue provisions; there accordingly is no reason to believe that the Legislatures' choice of statutory language was anything but well-considered.

And while we frankly acknowledge that, whatever its meaning, the venue provision is not a model of clarity, a considered waiver of constitutional immunity surely requires something more than the inclusion of a reference to federal judicial districts in a venue clause.

ARGUMENT

THE PORT AUTHORITY'S ELEVENTH AMENDMENT IMMUNITY HAS BEEN NEITHER WAIVED NOR ABROGATED.

The rules that govern the resolution of this suit are clear and well settled. The Eleventh Amendment deprives the federal courts of jurisdiction to entertain claims against States except in two circumstances: where the States themselves have consented to suit, or where Congress has abrogated the States' constitutional immunity. In either case, the intent (on the part of the State or of Congress) to permit suit in federal court must have been expressed unambiguously in the text of the relevant statute. On the assumption that the Port Authority is a State for Eleventh Amendment purposes, this case turns on the waiver prong of immunity analysis; suits against the Port Authority may proceed in federal court only if New York and New Jersey, by enactment of the Compact's consent-to-suit and venue provisions, specifically intended to waive the Port Authority's Eleventh Amendment immunity. We do not understand the court of appeals to have disagreed with this approach. See Pet. App. A16. The court below went fatally wrong, however, in its application of the rule to the controlling statutory language.

A. Only Express Statutory Language Suffices To Waive Eleventh Amendment Immunity.

1. Although the Eleventh Amendment "deprives federal courts of any jurisdiction to entertain * * * claims" against unconsenting States (*Pennhurst State School and*

Hospital v. Halderman, 465 U.S. 89, 99 n.8 (1984)), this Court has long held that States may waive their constitutional immunity—that they may, in effect, vest jurisdiction in the federal courts.[3] Whether a State has done so in any given case, however, is a matter of state law. And rather than permit federal courts to guess at the meaning of ambiguous state statutes in this sensitive area of sovereign prerogative, the Court has set out a firm interpretive rule: federal courts may find a waiver "'only where stated "by the most express [statutory] language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction."'" *Florida Dept. of Health v. Florida Nursing Home Ass'n*, 450 U.S. 147, 149-150 (1981) (*per curiam*) (citations omitted). See *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 239-240 (1985); *Edelman v. Jordan*, 415 U.S. 651, 673 (1974); *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909).

This insistence on an explicit waiver of Eleventh Amendment immunity in the text of the state statute—variously characterized by the Court as requiring "an unequivocal indication"[4] or a "clear declaration"[5] that the State intends to subject itself to suit in federal court—means that "a State does not waive Eleventh Amendment immunity in federal courts simply by waiving sovereign immunity in its own courts." *Welch v. Texas Dept. of*

[3] As Justice Marshall has noted, "as a rule, power to hear an action cannot be conferred on a federal court by consent. And, it may be that the recognized power of States to consent to the exercise of federal judicial power over them is anomalous in light of present-day concepts of federal jurisdiction. Yet, if this is the case, it is an anomaly that is well established as a part of our constitutional jurisprudence." *Employees v. Missouri Dept. of Public Health*, 411 U.S. 279, 294 n.10 (1973) (Marshall, J., concurring in the result).

[4] *Atascadero*, 473 U.S. at 238 n.1.

[5] *Pennhurst*, 465 U.S. at 99 n.9.

Highways and Public Transportation, 483 U.S. 468, 473-474 (1987) (plurality opinion).[6] Instead,

> [t]he test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one. Although a State's general waiver of sovereign immunity may subject it to suit in state court, it is not enough to waive the immunity guaranteed by the Eleventh Amendment. • • • "[A] State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." [*Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 (1984)]. Thus, in order for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in *federal court*.

Atascadero, 473 U.S. at 241 (emphasis in original) (citation omitted).[7]

2. The nature of the inquiry is not changed by the presence in this case of an interstate compact. In *Petty*

[6] See *Edelman*, 415 U.S. at 677 n.19; *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 577-579 (1946); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 465-466 (1945); *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47, 54 (1944); *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 172 (1909); *Smith v. Reeves*, 178 U.S. 436, 441-445 (1900).

[7] The Court's presumptive approach to Eleventh Amendment waivers is, in fact, in full accord with the treatment of sovereign immunity by the New York and New Jersey courts. See, *e.g.*, *Albany County Industrial Development Agency v. Gastinger Ries Walker Architects, Inc.*, 534 N.Y.S.2d 823, 825 (App. Div. 1988) ("sovereign immunity must be explicitly waived"); *Ashland Equities v. Clerk of New York County*, 493 N.Y.S.2d 133, 135 (App. Div. 1985); *Hunterfly Realty Corp. v. State*, 309 N.Y.S.2d 260, 263 (Sup. Ct. 1970) ("waivers of sovereign immunity must be strictly construed"); *Pinckney v. Jersey City*, 355 A.2d 214, 216 (N.J. Super. Ct. 1976) ("acts in derogation of sovereign immunity are to be strictly construed and • • • provisions which are conditions the sovereign attaches to the waiver of immunity are jurisdictional").

v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 278-279 (1959), the Court indicated that, where a waiver of immunity arises from the terms of a compact that has been enacted into law by Congress, the scope of the waiver may be determined as a matter of federal law. Here, however, the controlling consent-to-suit provision was not a part of the Port Authority Compact when it was approved by Congress in 1921. To the contrary, the provision was enacted 30 years later by the New York and New Jersey Legislatures pursuant to Article Seven of the Compact, which provides that "[t]he port authority shall have such additional powers and duties as may hereafter be delegated to or imposed upon it from time to time by the action of the legislature of either state concurred in by the legislature of the other." N.Y. Unconsol. L. § 6408; N.J.S.A. 32:1-8. Needless to say, "any suggestion that Congress actually considered the implications of its approval of the compact here on the Port Authority's eleventh amendment immunity would be an obvious fiction." *Leadbeater v. Port Authority Trans-Hudson Corp.*, 873 F.2d 45, 50 n.6 (3d Cir. 1989). In such circumstances, "when the alleged basis of waiver of the Eleventh Amendment's immunity is a state statute, the question to be answered is whether the State has intended to waive its immunity." *Petty*, 359 U.S. at 278.

In any event, even if the scope of the waiver here were thought to be a matter of federal law, the controlling interpretive rules would remain the same. Federal law makes clear, in the setting of suits against the United States, that the Court "must construe waivers strictly in favor of the sovereign, see *McMahon v. United States*, 342 U.S. 25, 27 (1951), and not enlarge the waiver '"beyond what the language requires,"' *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-686 (1983), quoting *Eastern Transportation Co. v. United States*, 272 U.S. 675, 686 (1927)." *Library of Congress v. Shaw*, 478

U.S. 310, 318 (1986).[8] And in the particular context of the Eleventh Amendment, the Court—drawing directly from its decisions requiring that state waivers of immunity be express[9]—has held that, before Congress will be found to have overridden a State's immunity, "evidence of congressional intent must be both unequivocal and textual." *Dellmuth v. Muth*, 109 S.Ct. 2397, 2401 (1989). The "[l]egislative history generally will be irrelevant" to this inquiry (*ibid.*): "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Atascadero*, 473 U.S. at 242.[10]

3. These strict rules of construction are more than fastidiousness on the part of the Court; their use is dictated by a complex of considerations that relate to "the sensitive problems 'inherent in making one sovereign appear against its will in the courts of the other.'" *Welch*, 483 U.S. at 486-487 (plurality opinion), quoting *Employees v. Missouri Dept. of Public Health*, 411 U.S. 279, 293-294 (1973) (Marshall, J., concurring in the result). As we note above, the Eleventh Amendment is "an essential component of our constitutional structure" (*Dellmuth*, 109 S.Ct. at 2400) that imposes a textual limit on the jurisdiction of the federal courts; those courts are properly reluctant to expand that jurisdiction at the expense of the States—and thus disturb "the fundamental constitutional balance between the Federal Gov-

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[8] See, *e.g.*, *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981); *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *United States v. Kubrick*, 444 U.S. 111, 117-118 (1979); *United States v. Sherwood*, 312 U.S. 584, 586, 590 (1941).

[9] See *Atascadero*, 473 U.S. at 240-241; *id.* at 253 n.5 (Brennan, J., dissenting); *Pennhurst*, 465 U.S. at 99.

[10] See *Welch*, 483 U.S. at 468, 473-474 (plurality opinion); *Quern v. Jordan*, 440 U.S. 332, 343-345 (1979); *Employees*, 411 U.S. at 282-283.

ernment and the States" (*Atascadero*, 473 U.S. at 238)—in the absence of an entirely unambiguous authorization from the States or from Congress.[11] And that reluctance should be compounded when, in assessing the scope of a waiver of immunity, federal judges are called upon to determine their jurisdiction by reference to state laws to which they cannot give authoritative interpretations.[12]

In this setting, the requirement of express statutory language to effectuate a waiver guarantees that the state legislature actually considered the issue and made an affirmative decision to waive the Eleventh Amendment immunity. At the same time, the requirement assures that a federal judge will not precipitate a constitutional confrontation by holding mistakenly that a State wished to subject itself to suit in federal court. Cf. *Welch*, 483 U.S. at 477-478 (plurality opinion). Indeed, the Court's requirement of unambiguous waiver has taken on independent significance by providing clear rules of decision against which state legislatures—including those that enacted the consent-to-suit clause at issue here—may act when setting the scope of their waivers of immunity. Cf. *Finley*, 109 S. Ct. 2003, 2008-2010 (1989).

In these circumstances, the Court's "'reluctance to infer that a State's immunity from suit in the federal courts has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system.'" *Atascadero*, 473 U.S. at 242, quoting

[11] See *Welch*, 483 U.S. at 474-476 (plurality opinion); *Atascadero*, 473 U.S. at 242-243. Cf. *Finley v. United States*, 109 S.Ct. 2003, 2008-2009 (1989) (citation omitted) ("'Due regard for the rightful independence of state governments . . . requires that [federal courts] scrupulously confine their own jurisdiction to the precise limits which the statute has defined.'"); *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18 (1951).

[12] State courts are unlikely to have had occasion to provide guidance on the question whether state law authorizes suit in federal court.

Pennhurst, 465 U.S. at 99. "At first blush," as Justice Marshall has explained, "it may seem hypertechnical to say that these [respondents] are entitled personally to enforce their federal rights against the State in a state forum rather than in a federal forum. If that be so, I think it is a hypertechnicality that has long been understood to be a part of the tension inherent in our system of federalism." *Employees*, 411 U.S. at 298 (Marshall, J., concurring in the result).

B. The Controlling State Statutes Do Not Effect A Waiver of Eleventh Amendment Immunity.

1. Applying these rules here makes clear, in our view, that New York and New Jersey did not waive the Port Authority's Eleventh Amendment immunity. As an initial matter, the plain language of the Compact's consent-to-suit provision does not authorize suit in federal court. That provision, titled "[c]onsent to suits against the Port Authority," provides simply that "the states of New York and New Jersey consent to suits, actions or proceedings of any form or nature at law, in equity or otherwise * * * against the Port of New York Authority." N.Y. Unconsol. L. § 7101; N.J.S.A. 32:1-157. The provision makes no mention of either the Eleventh Amendment or the possibility of suit in federal court; under this Court's decisions, the provision cannot be deemed to waive the Port Authority's Eleventh Amendment protections. See, *e.g.*, *Atascadero*, 473 U.S. at 241; *Kennecott*, 327 U.S. at 575 n.1, 575-577.

The court below did not take issue with this conclusion. Instead, its holding that a waiver had been effected rested on consideration of two factors other than the language of the consent-to-suit provision: the Compact's legislative history and its venue clause. But neither of these factors is a substitute for the requisite "unequivocal waiver specifically applicable to federal-court jurisdiction." *Atascadero*, 473 U.S. at 241.

As we note above, the Court has made clear that legislative history generally should not be considered in determining the existence of an Eleventh Amendment waiver. And the wisdom of that rule is well-illustrated by a look at the exceedingly slender evidence on which the court below relied in concluding that the States intended to waive the Port Authority's immunity. The sparse legislative history of the Port Authority consent-to-suit provision in fact makes no mention of the Eleventh Amendment, and nowhere suggests that the States specifically intended to set aside the Port Authority's federal court immunity; far from effecting an unlimited waiver, the history makes clear that "[t]he consent is limited by the usual conditions generally imposed upon suits against governmental bodies." 1950 New York State Legislative Annual (Leg. Ann.) 204.

In nevertheless finding support for an Eleventh Amendment waiver, the court of appeals concluded that the legislative history indicated an intent on the part of the Legislatures to overrule *Howell v. Port of New York Authority*, 34 F. Supp. 797 (D.N.J. 1940), a district court decision that dismissed an action against the Port Authority on sovereign immunity grounds. See Pet. App. A17. In fact, however, *Howell* was one of nine cases listed in the legislative history, as part of a string citation in a footnote, to establish the unexceptional proposition that the Port Authority had been held immune from suit in *any* court absent a waiver. Leg. Ann. 204 n.1. The States plainly could have sought to change that rule by setting aside the Port Authority's common law immunity against suit in state court without also authorizing suits in federal court. With this in mind, a single ambiguous citation in a footnote does not establish that the States affirmatively considered whether they wished to surrender their Eleventh Amendment immunity, and

certainly does not rise to the level of an unambiguous textual waiver.[13]

The court of appeals also relied (Pet. App. A16-A18) on the venue provision accompanying the Compact's consent-to-suit clause, which provides, in relevant part, that

> [t]he foregoing consent is granted upon the condition that venue in any suit, action or proceeding against the port authority shall be laid within a county or judicial district, established by one of said states or by the United States, and situated wholly or partially within the port of New York district. The port authority shall be deemed to be a resident of each such county or judicial district for the purpose of such suits, actions or proceedings.

N.Y. Unconsol. L. § 7106; N.J.S.A. 32:1-162. The court below itself recognized, however, that "use of the term 'venue' is somewhat anomalous in the Eleventh Amendment context." Pet. App. A17. In our view, this is a considerable understatement; in fact, the placing of venue and the waiver of Eleventh Amendment immunity are two entirely different things.

Absent waiver, the Eleventh Amendment "deprives federal courts of any jurisdiction to entertain * * * claims" against States (*Pennhurst*, 465 U.S. at 99 n.8); "Eleventh Amendment immunity 'partakes of the nature of a jurisdictional bar.'" *Welch*, 483 U.S. at 476 n.6 (plurality opinion), quoting *Edelman*, 415 U.S. at 678. It is for this reason—because the Amendment "'sets

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[13] An examination of *Howell* does nothing to alter this conclusion. The decision does not discuss the Eleventh Amendment in terms; it describes the sole question in the case as whether "the Port of New York Authority [is] a sovereign agency of the states of New York and New Jersey, immune from suit in the absence of express consent?" 34 F. Supp. at 798. The court's holding was that the Port Authority "performs governmental functions beyond state lines, and * * * is immune from suit without its consent." *Id.* at 801.

forth an explicit limitation on federal judicial power'" (*Pennhurst*, 465 U.S. at 99 n.8, quoting *Ford*, 323 U.S. at 467)—that an Eleventh Amendment claim may be asserted for the first time in this Court. See *Pennhurst*, 465 U.S. at 99 n.8; *Edelman*, 415 U.S. at 678. See generally *Nevada v. Hall*, 440 U.S. 410, 420-421 (1979); *Ex Parte New York, No. 1*, 256 U.S. 490, 497 (1921). A valid waiver of immunity therefore is necessary to vest the federal court with jurisdiction.

In contrast, "[v]enue provisions come into play only *after* jurisdiction has been established and concern 'the place where judicial authority may be exercised'; rather than relating to the power of a court, venue 'relates to the convenience of litigants and as such is subject to their disposition.'" *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 793 n.30 (1985) (emphasis added), quoting *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939). See *Leroy v. Great Western United Corp.*, 443 U.S. 173, 180 (1979); *Denver & R.G.W.R.R. v. Brotherhood of Railroad Trainmen*, 387 U.S. 556, 559 (1967) ("Of course, venue for a suit against an unincorporated association becomes important only if the association is itself suable"). "This distinction between the court's power to adjudicate and the place where that authority may be exercised must always be recognized." 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3801 at 5 (footnote omitted) (2d ed. 1986). The understanding of the distinction between jurisdiction and venue—and this usage of the terms—was settled at the time of enactment of the Compact's consent-to-suit and venue provisions. See, *e.g.*, *Neirbo*, 308 U.S. at 167-168.

There accordingly is no reason to suppose that the Legislatures' choice of statutory language was anything but well-considered. Indeed, the Compact's venue provision plainly was envisioned as a *limitation* on the separate waiver of immunity; referring to N.Y. Unconsol. L. § 7101 and N.J.S.A. 32:1-157, the venue provision provides that "[t]he foregoing consent [to suit] is granted upon the condition that venue" be laid in specified courts. It therefore is hardly likely that the venue provision was understood to operate as an affirmative grant of power to the federal courts. To the contrary, it would be perverse to hold that a provision designed to limit the waiver of immunity has the effect of authorizing an entirely new category of suits.

The court of appeals nevertheless concluded that the venue provision must amount to a waiver of Eleventh Amendment immunity, reasoning that the provision otherwise would be "entirely meaningless." Pet. App. A18. We frankly acknowledge that the purpose of the reference to federal judicial districts in the venue clause is obscure. Inclusion of the language may have been an effort, albeit an ineffective one, to define venue in suits where Congress already had abrogated the Port Authority's immunity.[14] But while it may be unclear what the provision does accomplish, it is entirely clear that laying venue in a particular district does not grant *jurisdiction* to courts located there. Thus, as Judge Seitz wrote for the Third Circuit in declining to find a waiver of the Port Authority's Eleventh Amendment immunity, "whatever the purposes of this part of [N.J.S.A.] Section 32:1-162, we think the Supreme Court, by requiring proof of consent by 'overwhelming implication,' mandates that there be much more than inclusion of a reference to a federal judicial district in a venue provision." *Leadbeater v. Port Authority Trans-Hudson Corp.*, 873 F.2d 45, 49 (3d Cir. 1989). That conclusion plainly was correct. However it is read, the venue provision is not a model of clarity; and where the meaning of a statute

[14] As the court of appeals recognized (Pet. App. A18), venue in such actions would be determined by reference to federal statutes. See generally 15 C. Wright, A. Miller & E. Cooper, *supra*, § 3803 at 10-17.

claimed to set aside the Eleventh Amendment is in doubt, "imperfect confidence will not suffice given the special constitutional concerns in this area." *Dellmuth*, 109 S. Ct. at 2401-2402.

2. We add that the outcome here would be no different if this case were viewed as involving a question of congressional abrogation rather than state waiver of the Eleventh Amendment—in other words, if the controlling law were understood to be the congressional resolution approving the Port Authority Compact. The Court found that such a resolution overrode the Eleventh Amendment in *Petty*, where the compact approved by Congress contained a sue-and-be-sued clause and where the Compact language specifically reserved the powers of " 'any court of the United States.' " 359 U.S. at 281. In contrast, the Port Authority Compact did not contain a consent-to-suit provision at the time it was approved by Congress, and it makes no reference to the federal courts; the Compact provides only, in general terms, that it "shall not be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over the region which forms the subject of such agreement." 42 Stat. 174, 177 (1921). It is plain that "this general language upon which Congress's approval of the interstate compact was conditioned" does not "speak[] with sufficient clarity to abrogate P.A.T.H.'s eleventh amendment immunity." *Leadbeater*, 873 F.2d at 50.[18]

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[18] Indeed, it is not at all clear, after the decision in *Dellmuth*, *Welch*, and *Atascadero*, that the language at issue in *Petty* would today be held to abrogate the Eleventh Amendment. See *Leadbeater*, 873 F.2d at 50. See generally *Edelman*, 415 U.S. at 672. Cf. *Welch*, 483 U.S. at 495 (White, J., concurring in the opinion and judgment).

CONCLUSION

If the Court answers the first question presented in the petition for a writ of certiorari by holding that the Port Authority should be treated as a State for Eleventh Amendment purposes, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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